STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. SOM-23-483

CHOCKSTONE GROUP, LLC, et al.

Plaintiffs-Appellees

v.

ROBERT A. MARTIN, et al.

Defendants-Appellants

On Appeal from Somerset County Superior Court
Docket No. RE-2020-004

REPLY BRIEF OF APPELLANTS ROBERT A. MARTIN AND CHARLOTTE M. FAWCETT

Joshua D. Dunlap, Bar No. 4477
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jdunlap@pierceatwood.com
kcleary@pierceatwood.com
(207) 791-1100

Appellants Robert A. Martin and Charlotte M. Fawcett

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INTRODUCTION

The Childs Family asks this Court to hold for the first time that a claimant can establish a prescriptive easement over another's land even though the landowner charged the claimant maintenance fees that the claimant paid upon demand. Neither the Childs Family nor the Superior Court identified any case law supporting this unprecedented outcome. That is unsurprising, as a claimant's payment of maintenance fees upon demand is inconsistent, as a matter of law, with the requirement that the claimant establish both (1) acquiescence, which requires a showing that the landowner passively assented or submitted to the use, and (2) adversity, which requires a showing (a) that the landowner provided no express or implied permission and (b) that the claimant acted in complete disregard of the owner's rights. The Superior Court erred in reaching the legal conclusion that payments for maintenance are consistent with these elements, and in doing so upended the reasonable expectation that a landowner's assessment of fees—even for maintenance—paid upon demand is sufficient to protect the landowner's interest in maintaining dominion and control over his or her property.

ARGUMENT

I. The Superior Court erred as a matter of law by concluding that the Childs Family obtained a prescriptive easement to Wildwood Lane despite making payments at the demand of the Martin Family.

A. The claims presented on appeal should be reviewed de novo.

The Childs Family asks this Court to apply a clear error standard of review, but that standard does not apply to the Martin Family's legal arguments on appeal. The clear

error standard applies only to "factual findings." *Androkites v. White*, 2010 ME 133, ¶ 12, 10 A.3d 677. It is blackletter law that this Court reviews questions of law—including questions of law raised in prescriptive easement cases—under a de novo standard of review. *Lincoln v. Burbank*, 2016 ME 138, ¶ 26, 147 A.3d 1165 ("We review questions of law related to easements de novo."). This Court has accordingly reviewed issues relating to interpretation of deeds and contracts de novo, *see, e.g.*, *Mill Pond Condo. Ass'n v. Manalio*, 2006 ME 135, ¶ 6, 910 A.2d 392, but has never limited de novo review to the interpretation of such documents; rather, it extends to any legal question, *see Lincoln*, 2016 ME 138, ¶ 26, 147 A.3d 1165; *Murch v. Nash*, 2004 ME 139, ¶ 10, 861 A.2d 645. Thus, for example, this Court has said that "[w]hat acts of dominion will result in creating . . . an easement by prescription is a question of law." *Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶ 31, 804 A.2d 364.[1]

Under the standard articulated in *Lyons*, the arguments raised on appeal by the Martin Family are legal in nature and must be reviewed de novo. On appeal, the Martin Family challenges the Superior Court's legal conclusions that "[p]ayments made for maintenance do not preclude a finding of acquiescence," A.23, ¶ 58, and are "not necessarily inconsistent with a claim of right," A.23-24, ¶ 62. The Martin Family also challenges the Superior Court's application of a presumption in assessing adversity.

[1] *See Connolly v. Me. Cent. R.R. Co.*, 2011 ME 108, ¶ 10, 30 A.3d 830 (although findings regarding the circumstances relating to an alleged quasi-easement are reviewed for clear error, "the extent to which those circumstances give rise to a quasi-easement is a question of law . . . review[ed] de novo").

A.23, ¶ 61.[2] The question on appeal, therefore, is whether—as a matter of law—the facts as found by the Superior Court are sufficient to support its legal conclusion that the Childs Family satisfied the burden to establish a prescriptive easement. The Court must determine that issue de novo. *Lyons*, 2002 ME 137, ¶ 31, 804 A.2d 364.

The Childs Family wrongly conflates the Superior Court's factual and legal conclusions in arguing for broad application of the clear error standard. The Childs Family suggests, for example, that both the trial court's finding that "the money they and their predecessors historically paid to the Martin family was a contribution for maintenance" and the trial court's conclusion that "[p]ayments made for maintenance do not preclude a finding of acquiescence," A.23, ¶ 58, are subject to the clear error standard of review. Red Br. at 15, 22-23. Not so. The first of these two is a factual finding subject to clear error review and is not at issue on appeal; the second, however, is a legal conclusion that this Court must review de novo in this appeal. Accordingly, the Childs Family's lengthy argument that the Superior Court's finding that the payments made by the Childs Family were for maintenance does not constitute clear error, *see* Red Br. at 16-21, completely misses the point.[3]

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[2] The Martin Family also argues that, even if the Superior Court did not err as a matter of law in concluding that the Childs Family established the elements of a prescriptive easement, a remand would be necessary because the court also erred by excluding the Russell Martin testimony. *See* Part II, *infra.*

[3] It is therefore not necessary to respond in detail to the factual recitation provided by the Childs Family, even though the recitation has inconsistencies with the testimony provided at trial. For example, the Childs Family claims that Russell Martin "had once hit a person over the head with a shovel." Red Br. at 5 (citing Tr. 159-160). The testimony at trial was instead that a neighbor, Guy Woods, "came up and hit him [Russell Martin] in the head with a shovel." Tr. 159-60. Ultimately, however, the errors in the factual recitation are irrelevant to the issues before the Court.

B. The Childs Family's payment of fees to the Martin Family precludes, as a matter of law, a finding of acquiescence.

On appeal, the Childs Family does not discuss this Court's extensive precedent establishing what is necessary to show acquiescence. This is for good reason—this Court's precedent contradicts the theory espoused by the Superior Court. Acquiescence is "passive assent or submission to the use." *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 21, 106 A.3d 1099 (quotation marks omitted); *see Taylor v. Nutter*, 687 A.2d 632, 635 (Me. 1996). Assessment of maintenance fees is inconsistent with "passive assent."

1. The Childs Family paid fees to the Martin Family relating to Wildwood Lane.

As an initial matter, the Superior Court found, as a matter of fact, that the Childs Family paid fees to the Martin Family relating to Wildwood Lane. *See* A.19, ¶ 24 (ledgers showing payments); *id.* ¶ 26 (Edwin "Pete" Childs paid Robert Martin fees for "years" after Robert took over operation of Wildwood Camps, but the "fee was not always paid" after Pete stopped paying). Further, as the court found, "historically, the Childs family made contributions for maintenance *when asked*." *Id.* ¶ 27 (emphasis added).

The Childs Family cannot show that court's factual findings regarding these payments were clearly erroneous. The Childs Family seems to suggest that payments were made solely on a "periodic, occasional" basis until 2006, Red Br. at 16-17, or even that there is some question as to whether payments were made to the Martin Family, *see, e.g.*, *id.* at 18-20 (discussing testimony of BJ Frosch regarding use of the Childs Camp since 1906 and BJ's lack of payment to the Martin Family, as well as the testimony of

Charlotte Fawcett that she was not paid directly). The Superior Court, however, expressly rejected BJ's testimony regarding use of the Childs Camp before 1946, A.22 ¶ 50 & n.6, and found that members of the Childs Family other than BJ did make payments to the Martin Family, A.19, ¶¶ 26, 28, 30. Competent evidence supported the finding that members of the Childs Family made payments to the Martin Family—including ledgers showing payments, *see* Tr. 143-47, 207; A.74-122, and testimony regarding regular payments by Pete Childs to the Martin Family, Tr. 195-96, *see id.* at 155-57, 220, 229.[4] Although there was more irregularity in payment after Pete stopped paying, Tr. 196-97, 207-208, 219-20, the Childs Family admitted making contributions relating to Wildwood Lane "on an annual basis to the Martins" as of 1997—even after Dennis Theis (rather than Pete) had begun handling the payments, Tr. 77, 79-81, 92; *see* 195-96.[5] Accordingly, the Superior Court did not clearly err in finding that the Martin Family required, and the Childs Family paid, fees relating to Wildwood Lane.

2. Assessment of fees is inconsistent with acquiescence.

Given the Superior Court's factual finding that the Childs Family made recurring payments to the Martin Family, the legal question presented is whether such

[4] The Childs Family makes an irrelevant attack on the credibility of Robert Martin, by, for example, suggesting that his testimony was unreliable because he characterized the fees paid under the 2006 Maintenance Agreement as relating to use of the road. Red Br. at 18-19. But that is exactly what the Superior Court concluded: "The language in the Maintenance Agreement . . . suggests that Plaintiffs' use of the Road may have been permissive after execution of the Maintenance Agreement in 2006." A.23, ¶ 56. The testimony that the Childs Family decries as incredible was credited by the trial court.

[5] Notably, the Childs Family concedes that payments were made to the Martin Family in the 1980s. Red Br. at 6. Thus, if maintenance payments are inconsistent with a claim for prescriptive easement, then there is no window for twenty years of uninterrupted adverse use. *See* Blue Br. at 22.

payments—even if denominated as payments for maintenance, *see* A.23, ¶ 58—are consistent with the Superior Court's conclusion that the Childs Family carried the burden to establish acquiescence. They are not. If the Martin Family demanded payment, as the Superior Court found, *see* A.19, ¶ 27, then they were not simply passively assenting or submitting to the use of the road by the Childs Family. *See Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099. Importantly, acquiescence must be measured by the actions of the landowner. *Id.* Assessment and collection of fees by the landowner is diametrically opposed to passivity or submission. Demanding payment of maintenance fees demonstrates the landowner's intent to assert control, and it does not matter what reason the claimants—here, the Childs Family—had in mind for making the payments.

The Childs Family's brief does not engage with the key consequence of the Superior Court's holding—namely, that landowners who actively oversee their property by assessing maintenance fees to those who use the property could lose exclusive rights to their property simply because they did not expressly state that they were granting permission. A reasonable landowner would believe that the imposition of maintenance fees is consistent with the continued exercise of dominion over their own land. A reasonable landowner who charges fees for maintenance would not believe that it is necessary to expressly condition continued use on the payment of those fees; such a condition is implied. Because assessment of maintenance fees clearly implies consent, a reasonable landowner would not expect to have to take additional steps to protect their interests in their property. Thus, contrary to blackletter law that prescriptive easements

"are not favored by the law," 28A C.J.S. Easements § 23 (May 2024 update), and that landowners do not have to cross a high threshold to demonstrate non-acquiescence, *Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099; *see Dartnell v. Bidwell*, 115 Me. 227, 98 A. 743, 745 (1916), the Superior Court's ruling effectively requires landowners to expressly state that use is conditioned on the payment of maintenance fees in order to protect their property interests. The Childs Family cites no case supporting such an outcome, and the Law Court should not now require such a step for the first time.

The Childs Family seeks to distinguish *Clement v. Shea*, 2004 WL 843182 (Me. Super. Ct. Feb. 12, 2004) (Hjelm, J.), but offers no cases supporting the Superior Court's conclusion in this case. The Childs Family suggests that, in *Clement*, "[i]t was not the fact of payment," but rather "the totality of the circumstances" which "compelled the trial court to find no prescriptive easement." Red Br. at 23. Certainly, in that case, some users had obtained express permission to use the road—but not all. *Clement*, 2004 WL 843182, at *2, *4. Even the users who had not obtained express permission nevertheless failed to establish a prescriptive easement because the payment of maintenance fees was evidence of the landowner's active oversight of his land. *Id.* The payments were evidence that the landowner "authorized and permitted the claimants to use the road as they did." *Id.* at *4. Although the facts in *Clement* differ in their particulars from the facts of this case, the same basic point is true here: the Martin Family, as landowners, exercised active oversight over the use of Wildwood Lane and thus did not "passively submit" to the Childs Family's use. *See id.* at *4 (maintenance fees imposed by

landowner showed that the landowner "did not merely submit or assent to the plaintiffs' use passively"). The Childs Family offers no case to support a contrary conclusion.

The Childs Family bore the burden to prove that the Martin Family passively submitted to use of Wildwood Lane. *See Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099. The evidence, however, showed that the Martin Family collected maintenance fees for the road. This active oversight defeats the Childs Family's claim as a matter of law.

C. The Childs Family's payment of fees to the Martin Family precludes, as a matter of law, a finding of adversity.

The Childs Family also does not discuss this Court's precedent establishing what is necessary to show adversity. Again, this is for good reason—this Court's precedent is inconsistent with the Superior Court's legal conclusion. To be under claim of right, a use "may not be in recognition of or subordination to the record title owner." *Androkites*, 2010 ME 133, ¶ 16, 10 A.3d 677 (quotation marks omitted). Either "express *or implied* permission" defeats a claim of right, and the user must act in complete disregard of the owner's claims, "using it as though he own[s] the property himself." *Almeder*, 2014 ME 139, ¶ 20, 106 A.3d 1099 (emphasis added). These requirements cannot be squared with payment of maintenance fees upon the landowner's demand.

The Childs Family's payment of maintenance fees "when asked" by the Martin Family, as the Superior Court found, A.19, ¶ 27, is inconsistent with a claim of right. First, a demand constitutes implied consent for the reasons discussed above. The Superior Court erred by failing to recognize that "implied permission" precludes a

finding of adversity, *Almeder*, 2014 ME 139, ¶ 20, 106 A.3d 1099, when it concluded that maintenance fees are consistent with a prescriptive easement claim, *see* A.24, ¶ 62. Second, payment of fees upon demand of the landowner demonstrates the user's subordination to the landowner. In response, the Childs Family argues that the payment of fees could, in theory, be explained because the Martins performed upkeep on the road as a "service provided to [the Childs Family]." Red Br. at 25. The trial court likewise speculated that payment of maintenance fees "is not necessarily inconsistent with a claim of right" because one might "pay a contractor or even a neighbor with needed equipment to maintain a driveway." A.24, ¶ 62. Notably, however, the Childs Family cites no record evidence suggesting that the Childs Family paid the Martin Family for maintenance that the Childs Family requested.[6] The Childs Family bore the burden to prove that the Martin Family was retained to perform services for the Childs Family, *see Androkites*, 2010 ME 133, ¶ 14, 10 A.3d 677, but failed to carry that burden.

In the absence of proof, the Superior Court erred by presuming that maintenance performed by the Martin Family was being conducted on behalf of the Childs Family and subject to an adverse claim of right. *See* A.23, ¶ 61. A presumption of adversity cannot be applied if there is "*an* explanation of the use that contradicts the rationale of the presumption." *Androkites*, 2010 ME 133, ¶ 17, 10 A.3d 677 (emphasis added). There

[6] The Childs Family suggests that the Martin Family needed, but failed, to provide some record evidence of "subordination." Red Br. at 25. This is wrong for two reasons. First, there is such evidence—payment of fees upon demand. A.19, ¶ 27. Second, it is an effort to shift the burden of proof, which lies squarely upon the Childs Family. *See Androkites*, 2010 ME 133, ¶ 14, 10 A.3d 677.

is such an explanation here: the Martin Family regularly conducted maintenance on Wildwood Lane and demanded payment of maintenance fees to offset additional costs caused by the Childs' Family's permissive use. Given this available explanation, it remained the Childs Family's burden to show that the Martin Family conducted maintenance at the Childs Family's request—but, as discussed above, the Childs Family provided no such evidence. The trial court therefore erred in overlooking the Childs Family's failure to prove that the maintenance payments were the equivalent of a payment to a contractor rather than recognition of the Martin Family's superior rights.

The Childs Family has identified no case law suggesting that payment of maintenance fees at the demand of the landowner is consistent with a finding of adversity. *Clement*, the only case law touching on that issue in Maine, is persuasive support for the Martin Family. That case shows that the payment of maintenance fees by a user—even those who had not obtained express permission from the landowner—is evidence that they "had [the landowner's] permission to use the road, so long as they made some contribution to its maintenance." 2004 WL 843182, at *4. Again, although *Clement* has factual differences from this one, it provides useful guidance; as in that case, absent evidence providing some other explanation, the payment of fees upon demand shows that the Childs Family had not "disregard[ed the owner's] claims entirely," as this Court requires for a showing of adversity. *Almeder*, 2014 ME 139, ¶ 20, 106 A.3d 1099.

Nor can the Childs Family meaningfully distinguish *Jacobs v. Boomer*, 267 A.2d 376 (Me. 1970). The Childs Family echoes the Superior Court's reasoning in distinguishing

Jacobs, namely, that the rent paid in that case was for right of use while "[m]aintenance payments . . . imply a preexisting right to the property to be maintained." A.24, ¶ 63; *see* Red Br. at 21-22. But that reasoning begs the question—do maintenance fees imply a preexisting right to the property and thus provide evidence that the Childs Family had a preexisting right of use? The court below and the Childs Family simply leap to that conclusion, with no legal or factual support. Such *ipse dixit* reasoning does not satisfy the Childs Family's burden of proof. This Court should conclude, as a matter of law, that—absent evidence that the landowner's maintenance was conducted at the initiation of the claimants—maintenance fees paid to the landowner upon the landowner's demand are inconsistent with a claim of right by the claimant.

In sum, this Court must decide, for the first time, whether a user's payment of maintenance fees upon demand is consistent, as a matter of law, with the Court's clear precedent requiring both absence of implied permission and complete disregard of the owner's claims to the land. *See Almeder*, 2014 ME 139, ¶ 20, 106 A.3d 1099. Not only would such a holding be without precedent, but it would also again upend the reasonable expectations of landowners and substantially lower the bar for disfavored prescriptive easements. The Childs Family offers no justification for such an outcome.

II. The Superior Court erred as a matter of law in excluding the Russell Martin deposition transcript under M.R. Evid. 803(16).

The Court need not reach the issue relating to the admissibility of the Russell Martin transcript if it concludes that the Superior Court erred as a matter of law by

concluding that payment of maintenance fees is consistent with a claim of prescriptive easement. Nevertheless, if the Court reaches the issue, it should conclude that the Superior Court's exclusion of the deposition testimony was legal error.

Although the Childs Family's brief reads as though the issue presented to the Court is whether the Superior Court erred in ruling that the Russell Martin deposition testimony should be excluded under Rule 804 of the Maine Rules of Evidence, the issue presented on appeal is whether the Superior Court erred in excluding the testimony under Rule 803(16), an entirely separate provision that is not circumscribed by the strictures of Rule 804(b)(1). Because there is no requirement under Rule 803(16) that the party against whom the evidence is being offered had the opportunity to develop the testimony through cross-examination, Rule 804(b)(1)(B) is irrelevant to this appeal.

The relevant inquiry under Rule 803(16) is whether the proffered statement is (1) in a "document" that is (2) "at least 20 years old," and (3) authenticated. M.R. Evid. 803(16). Because the Childs Family does not (and cannot) argue that the proffered Russell Martin testimony fails to satisfy those prerequisites, the statements in the Russell Martin deposition should have been admitted. None of the Childs Family's arguments can overcome this straightforward conclusion.

Rule 804(b)(1) is not the exclusive means for admitting former testimony. The Childs Family would have this Court rule that, because deposition testimony may be admissible under Rule 804(b)(1), then all proffered deposition testimony must satisfy that rule in order to be admitted. But some exception other than Rule 804(b)(1) may

apply. Courts have recognized that the hearsay exceptions in the Rules of Evidence are not exclusive; for example, a document might not be admissible as a business record but still be admissible as an ancient document. *See Wilco Marsh Buggies & Draglines, Inc. v. Weeks Marine, Inc.*, 2022 WL 17830468, at *5 (E.D. La. Dec. 21, 2022), *reconsidered on other grounds*, 2023 WL 4624744 (E.D. La. July 19, 2023) ("The hearsay exception for ancient documents does not bear some sort of double requirement of being both ancient and a business record. Instead Rule 803(16) is its own exception to the hearsay rule."); *United States v. Atlas Lederer Co.*, 282 F. Supp. 2d 687, 697 (S.D. Ohio 2001). Thus, the mere fact that a type of document may have been addressed in a specific hearsay exception does not mean that a broader, more generic exception cannot apply.

Once it is recognized that the hearsay exceptions are not exclusive, the only remaining argument advanced by the Childs Family is that it would be unfair to admit the deposition statements because counsel for the Childs Family never had the opportunity to cross-examine Russell Martin. Red Br. At 12-13. But the fact that the testimony was provided in a "wholly separate lawsuit brought by Robert Martin against a wholly different family," *id.* at 12, does not make it *less* fair to introduce the ancient testimony; rather, it highlights that the ancient testimony fits one of the justifications for Rule 803(16)—namely, that the context of the statement makes it "less likely that the declarant had a motive to falsify." 2 *McCormick on Evidence* § 323 at 594 (8th ed. 2020); *see* Blue Br. at 26-27. Further, the Childs Family's complaint that counsel had no opportunity to ask questions of Russell Martin about his testimony as it relates to the

present claims cannot be assessed in a vacuum. Rather, it must be balanced against necessity, the primary justification for the categorical exception for ancient documents in Rule 803(16). The ancient document exception provides an avenue for crucial evidence to be considered based on the rationale that genuine documents should not be excluded simply because witnesses may die given the passage of time (as in this case). 2 *McCormick on Evidence* § 323 at 594; *see* Blue Br. at 26. Based on necessity, Rule 803(16) allows for ancient deposition testimony to be admitted even without cross-examination.

Because there is no question that the Russell Martin deposition testimony fits the prerequisites for admission under Rule 803(16), the testimony should have been admitted and presumed reliable, subject to impeachment. *See United States v. Lileikis*, 929 F. Supp. 31, 38 (D. Mass. 1996). The Superior Court therefore erred by excluding the testimony, prior to any impeachment, on the basis that it bore some indicia of untrustworthiness. A.21-22, ¶ 47. This conclusion rested on the misapprehension that the context of the statement "created incentives to misreport some of the same facts at issue now." *Id.* The court never identified how the prior litigation could have generated a motive to misreport the reason for camp owners' payment of fees. Indeed, the Childs Family now concedes that "[n]oone [*sic*] argues that that litigation involved the Childs family or their interest," Red Br. at 12, and makes no effort to explain why Russell Martin would have had a motive to misrepresent the reason for collecting fees from the Childs Family—namely, "for the use of the road," Ex. 23 at 7, rather than maintenance—when he gave testimony in litigation unrelated to the Childs Family.

Finally, the Childs Family offers no substantial argument that exclusion of the Russell Martin testimony was harmless, contending only that admission of the underlying ledgers that were the subject of Russell Martin's testimony alleviated any harm. Red Br. at 14. But exclusion of testimony is not harmless if it is directly relevant to the issues in the case. *Morrill v. Morrill*, 1998 ME 133, ¶ 5, 712 A.2d 1039. The Russell Martin testimony is directly relevant to an issue the Superior Court found dispositive, namely, the purpose of the fees paid in relation to Wildwood Lane. *See* A.23, ¶ 58. Further, although Russell Martin's ledgers are also important evidence on this issue, his testimony is not merely cumulative of the information presented on the ledgers; rather, it provides important context explaining the purpose of the fees recorded in the ledgers. In fact, counsel for the Childs Family sought to impeach Greg Martin's testimony regarding the purpose of the road fees recorded in the ledgers by pointing out that he did not maintain the ledgers. Tr. 181. Accordingly, counsel for the Childs Family clearly believed that the persuasive value of the information shown in the ledgers differed based on who offered testimony regarding the ledgers; it follows that excluding the explanatory testimony of Russell Martin, the author of the ledgers, was prejudicial.

CONCLUSION

For the reasons stated herein and in the Martin Family's opening brief, the Court should reverse the judgment below and enter judgment in favor of the Martin Family.

DATED: May 30, 2024

/s/ Joshua D. Dunlap
Joshua D. Dunlap, Bar No. 4477
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jdunlap@pierceatwood.com
kcleary@pierceatwood.com
(207) 791-1100

Attorneys for Appellants Robert A. Martin and Charlotte M. Fawcett

CERTIFICATE OF SERVICE

I, Joshua D. Dunlap, hereby certify that two copies of this Reply Brief of Appellants Robert A. Martin and Charlotte M. Fawcett was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on May 30, 2024:

Judy A.S. Metcalf, Esq.
Judy Metcalf Law
76 Union Street
Brunswick, ME 04011
judy@judymetcalflaw.com

Dated: May 30, 2024

/s/ Joshua D. Dunlap
Joshua D. Dunlap, Bar No. 4477
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jdunlap@pierceatwood.com
(207) 791-1100

Attorney for Appellants Robert A. Martin and Charlotte M. Fawcett